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Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

against

FORT TRYON GARDENS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioner's application for a writ of certiorari attacks the constitutionality of a statute of the State of New York regulating the procedure in summary proceedings for the recovery of real property.

Petitioner, an attorney, was a tenant in the premises owned by the respondent, under a written lease expiring at midnight, September 14th, 1943 (R. 6). Petitioner knew, as early as June 1943, that the respondent had leased the very apartment occupied by him to another tenant under the terms of a written lease commencing on September 15th, 1943 (R. 6).

Upon his failure to vacate the premises on September 15th, 1943, after the expiration of his term, the respondent instituted proceedings to recover possession of the property. The precept and petition were served in accordance with the terms of the statute, on September 15th, 1943. Upon petitioner's default, a final order was issued, awarding respondent possession (R. 7).

Thereafter, petitioner moved to vacate his default and to dismiss the proceedings for want of jurisdiction (R. 8-14). This application was denied on September 30th, 1943 (R. 16). An appeal was then taken to the Appellate Term of the Supreme Court, First Department, which was argued in the January 1944 Term of that Court (R. 70). (Hereafter referred to as "the first appeal.")

On March 2nd, 1944, the order of Mr. Justice Curtin, which denied petitioner's motion, was reversed, and the case remitted to the Municipal Court to determine whether or not the petitioner had been given the two hour notice required by the statute (R. 17).

Instead of applying for leave to appeal to the Appellate Division from the order of the Appellate Term and urging the unconstitutionality of the Statute, petitioner accepted the benefits of the order on the first appeal and thereafter, and on March 9th, 1944, appeared in Court with Counsel and tried out the issue of whether or not adequate notice, in accordance with the Statute, had been given (R. 17-57). This hearing resulted in the order of Mr. Justice Toney, dated March 9th, 1944, which overruled petitioner's claim that he was not served within the statutory time, and overruled his motion to vacate the final order, which had been issued on September 15th, 1943 (R. 57).

Thereafter, petitioner again appealed to the Appellate Term of the Supreme Court, First Department (hereafter referred to as "the second appeal"). That Court, by order dated June 14th, 1944, affirmed the order of Mr. Justice Toney, without opinion (R. 58).

Petitioner thereafter made application to the Appellate Term for leave to appeal to the Appellate Division, which application was denied by order dated June 29th, 1944 (R. 64).

Finally, petitioner made application to the Appellate Division for leave to appeal to that Court from the determination of the Appellate Term on "the second appeal," which was denied by order dated October 13th, 1944 (R. 79-80).

It is thus clear that the petition for a writ of certiorari involves only "the second appeal", which presents solely a question of fact, *i.e.*, whether the petitioner was, or was not given the two hour notice prescribed by Statute.

Petitioner, by failing to move for leave to appeal to the Appellate Division after the entry of the order of the Appellate Term on "the first appeal", and by accepting that order and trying out the traverse, has precluded himself from any consideration by this Court on his present application for a writ of certiorari.

It is obvious, under such circumstances, that (1) no Federal question is presented; (2) petitioner has not exhausted all possible steps afforded by State procedure for review by the highest State Court; (3) petitioner, by accepting the benefits of the order on the first appeal, has waived the Federal question; (4) by trying out the issue of whether or not the precept and petition was served in the statutory time, petitioner has had his day in Court, and has been afforded due process.

Statement

Since the petitioner would have this Court believe that respondent "swooped down" and evicted him from his apartment with only two hours notice, we will set forth the undisputed facts in order to apprise this Court of the real situation.

Petitioner, an attorney, was a tenant in the premises owned by the landlord under a written lease expiring at midnight, September 14th, 1943 (R. 9).

In the month of May, 1943, petitioner received a letter from respondent asking him to renew his lease. On June 1st, 1943, petitioner wrote respondent informing it that he did not intend to renew his lease. In reliance upon petitioner's statement that he did not intend to renew his lease, the respondent on June 15th, 1943 rented the apartment to another tenant (Bonnfeld) for a term commencing at the expiration of his tenancy, to wit, September 15th, 1943 (R. 6, 42, 43).

In spite of petitioner's previous avowal that he did not intend to renew his lease, upon hearing that the apartment had been rented to a new tenant, he, as early as June 1943, told Mr. Bonnfeld that respondent would have trouble getting him (petitioner) out. Moreover, petitioner was notified by registered mail in July and August of 1943, that his apartment had already been rented and that he would have to vacate on September 15th, 1943 (R. 42, 43).

On September 15th, 1943, petitioner was still in his apartment, and, in order to give occupancy to Mr. Bonnfeld, who was entitled to possession on that day, it was necessary to evict petitioner on two hours' notice. Not only did petitioner attempt to intimidate Mr. Bonnfeld, but he interfered with the Marshal in the execution of the

warrant to obtain possession. It became necessary to call the police to assist the Marshal in his duties (R. 72, 73).

As a result of the actions on the part of the petitioner and his wife, two Magistrate's Court proceedings arose. In the first proceeding, the petitioner and his wife charged that two employees of the respondent had assaulted her in connection with obtaining possession on September 15th, 1943. At the same time, respondent made a cross complaint against petitioner by reason of his unlawful interference with the Marshal in the execution of a lawful mandate of the Court (R. 72, 73).

At this hearing before the Magistrate, it was suggested that both complaints be withdrawn. Counsel for respondent was satisfied to do this. Petitioner, however, refused to accept the suggestion of respondent or the Magistrate. After a full hearing before the Magistrate, respondent's two employees were acquitted (R. 72, 73).

Subsequently, a trial was had on the complaint made by respondent against the petitioner and his wife. Prior to the commencement of that hearing, respondent's counsel again consented to withdraw this charge, if petitioner and his wife would execute releases. Once more, petitioner refused, and the trial was had.

After a hearing, the Magistrate acquitted petitioner's wife and held petitioner to await the action of the Court of Special Sessions. On a hearing before that Court, the complaint against petitioner was dismissed (R. 72, 73, 77).

After the charge against petitioner's wife in the Magistrate's Court had been dismissed, she thereafter commenced, and there is now pending, an action in the Supreme Court of the State of New York, by her and petitioner to recover damages in the amount of $75,000 for malicious prosecution and false arrest.

Petitioner also has commenced an action for damages for alleged false arrest against the respondent, seeking to recover the sum of $50,000.

It was brought out on the hearing before Mr. Justice Toney that petitioner was then and is now occupying an apartment at premises 924 West End Avenue under a written lease which expires September 30th, 1945.

As further indicative of the lengths to which petitioner will go, to lay the foundation for another damage suit, is the statement on pages 10 and 11 of his brief, where he states:

> "What then are we to think of the plight of petitioner herein, himself a lawyer? The papers are served at his home a few minutes after ten in the morning (or so the landlord says). Petitioner has already left and is on his way to a court engagement in a neighboring county. His wife, taking care of two little children along with her other household duties, is unable to reach him by telephone despite efforts directed to that end."

On the hearing before Mr. Justice Toney, the petitioner testified that he did not go to Court in the morning, but on the contrary, went at or about two o'clock in the afternoon (R. 37).

It is regrettable that all these facts must be gone into, and that a member of the Bar will indulge in this type of practice, but we are endeavoring to show that this petitioner does not need the apartment, and that even though the question raised by this petitioner is moot, that he believes that if he will harrass the respondent long enough, it will pay him some money to get through with this litigation.

No claim is advanced by the petitioner that he needs the apartment for occupancy. He is in possession of another

apartment under a written lease expiring on September 30th, 1945, and it therefore requires no extended argument to demonstrate the real reason underlying this application (R. 41).

It is clear that petitioner, an attorney who can litigate without cost to himself, feels that if he continues his policy of harassment, it may result in his securing some financial benefit at the respondent's expense. That practice of this type should not be countenanced reqaires no extended argument.

POINT I

The petition should be denied since (a) no Federal question is presented; (b) petitioner has not exhausted all possibilities afforded by State procedure for review by the highest State Court; (c) petitioner, by accepting the benefits of the order on the first appeal, has waived the Federal question; (d) by trying out the issue of whether or not the precept and petition was served in the statutory time, petitioner has had his day in Court, and has been afforded due process.

The record is clear that on the first appeal petitioner failed to apply for leave to appeal to the Appellate Division. On the contrary, he accepted and acted under the order of that Court and tried out the issue of whether or not he had been given two hours' notice.

Let us examine the effect of such conduct. Under State law, petitioner was thus precluded from further pursuing "the first appeal". The law is well settled in this State, that an appellant cannot accept the benefit of a part of an order or judgment and appeal from the balance. (*Bennett* v. *Van Syckel*, 18 N. Y. 481; *Knapp* v. *Brown*, 45 N. Y. 207,

209; *Carll* v. *Oakley*, 97 N. Y. 633, 634; *Alexander* v. *Alexander*, 104 N. Y. 643; *Kraeger* v. *Warnock, et al.*, 81 App. Div. 150.)

It was for this reason, no doubt, that petitioner failed to apply for leave to appeal to the Appellate Division. As a result, when petitioner took his "second appeal", there was no longer before the Appellate Term a Federal question, it having been waived. Moreover, by failing to apply for leave to appeal to the Appellate Division on "the first appeal", the petitioner did not exhaust all remedies afforded him by State procedure for review by the highest possible State tribunal. Petitioner had the right to appeal to the Appellate Division, by making an application to that Court for leave to appeal from the decision of the Appellate Term rendered on "the first appeal" (New York State Civil Practice Act, Sec. 623, Subd. 1; Rule VII of the Rules of the Appellate Term, First Judicial Department; Rule X of the Rules of the Appellate Division of the Supreme Court, First Judicial Department).

In dismissing petitions for writs of certiorari, this Court has held that such failure is fatal.

In *Osment* v. *Pitcairn and Nicodemus*, 317 U. S. 587, this Court stated:

> "As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction."

Again, in *Gorman* v. *Washington University*, 316 U. S. 98, this Court stated at pages 100 and 101:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a State court should be

> brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted."

To the same effect, see *Stratton* v. *Stratton*, 239 U. S. 55.

This Court, obviously, will not entertain a petition for a writ of certiorari where the question presented, on its face, is frivolous.

The basis of petitioner's complaint here, is that Sections 1419 and 1421 of the Civil Practice Act, to the extent that they permit the issuance of a final order of eviction in summary proceedings instituted upon two hours' notice, should be held unconstitutional, as sanctioning the deprivation of property upon insufficient notice, and is therefore without due process of law.

The record is clear that petitioner had his day in Court after the order on "the first appeal" was made, and there litigated the issue of whether he had received two hours' notice.

If petitioner felt aggrieved and was of the opinion that the order of the Appellate Term on "the first appeal" was erroneous, he need not have accepted its decision. He might have made an application for leave to appeal to the Appellate Division on the ground that the entire proceeding was void because of the alleged insufficient notice.

Instead of availing himself of this opportunity, he accepted the benefits of the order of that Court, had a full and complete hearing, and only after he was defeated, claimed that the final order is not valid because it was obtained under a Statute which afforded him only two hours' notice.

The petitioner intimates in his brief (p. 11) that there was no need for speed as the new tenant did not move in for at least three days after September 15th, and that there was therefore no necessity for a proceeding instituted on two hours' notice. The fact that the tenant did not move in for a few days thereafter did not change respondent's obligation to give him possession on the 15th as the new tenant's lease started from the 15th. It was only because of the petitioner's refusal to vacate and his keeping possession of the apartment contrary to the law, to the Marshal and to the police who endeavored to give possession to the landlord, that the new tenant could not get in as the apartment required some decorating.

POINT II

Since the question presented is moot, the petition should be denied.

It is well established that this Court will not consider moot questions, and that where subsequent events have made it impossible to grant any effectual relief, the petition must be dismissed. (*St. Pierre* v. *U. S.*, 319 U. S. 41, 42; *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610, 615; *Mills* v. *Green*, 159 U. S. 651, 653.)

The facts in our case fall squarely within these rules. The respondent was awarded possession on September 15th, 1943 of an apartment occupied by the petitioner, as tenant. Petitioner's lease had expired on September 14th, 1943. Mr. Bonnfeld is now in possession of the premises under a written lease which commenced on September 15th, 1943.

Under these circumstances, no effective judgment could be rendered by this Court, since it would be impossible, even upon a holding that petitioner's ouster was illegal by virtue of the unconstitutionality of the statute, to put him in possession of his apartment again, and oust the present tenant.

Moreover, under the Emergency Price Control Act of 1942 and the regulations issued by the Office of the Price Administrator, it is impossible to remove the tenant, Bonnfeld, in this case. Said Act provides that a tenant cannot be removed unless the owner needs the apartment for his own personal use, which element is not present herein.

Another insurmountable obstacle is present in this case which renders any effectual judgment by this Court impossible.

Assuming the statute is unconstitutional and the final order is vacated, respondent would then have to commence another proceeding upon at least five days' notice to recover possession. Petitioner's defense asserted in the State courts was that there was an oral renewal of the lease for an additional term of one year from September 15th, 1943 to September 14th, 1944 (R. 9).

It is clear that at the present time, petitioner could have no possible claim to possession of the apartment since any possible rights to such possession expired on September 14th, 1944.

It is respectfully submitted that since lapse of time has made it impossible for this Court to grant petitioner any effectual relief, his petition should be denied.

POINT III

The two hour notice provided by Sections 1419 and 1421 of the New York Civil Practice Act, was a reasonable exercise of police power by the State Legislature. The notice provided therein was reasonable under the special circumstances and purposes for which these sections were enacted.

The Statutes Involved

The pertinent sections of the Civil Practice Act of the State of New York are, as follows:

> "Section 1419. PRECEPT; RETURN. The precept must be returnable not less than five nor more than ten days after it is issued; except that, where the proceeding is taken upon the ground that a tenant continues in possession of demised premises after the expiration of his term without the permission of his landlord and the application is made on the day of the expiration of the lease or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued at any time after twelve o'clock noon and before six o'clock in the afternoon." (L. 1921, ch. 199.)

> "Section 1421 (in part). PRECEPT; HOW SERVED. * * * If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable." (L. 1921, ch. 199.)

These two sections provide for at least five days' notice where a landlord seeks recovery of demised premises for reasons other than the expiration of the tenancy. Where

recovery was sought on the ground that the tenant held over after the expiration of his term, without the landlord's permission, a two hour notice is required. However, the legislature, as a further safeguard, provided that the precept initiating the proceeding under such circumstances could only be issued in the Court's discretion. No question can be raised in this Court that such discretion was improperly exercised, nor does petitioner claim an abuse of discretion on the part of the Court in issuing the precept.

The summary and speedy method for the recovery of possession of property under these special circumstances has existed in this State by statutory enactment since at least 1820. The Laws of 1820, Chapter CXCIV, Section 1, provided in substance that the summons (now called the precept) could issue and be made returnable the same day.

A similar provision was contained in the Revised Statute of 1829, Part 3, Chapter 8, Title 10, Sections 28, 29 and 30. A further similar provision was enacted by the Laws of 1851, Chapter 460, Section 30.

The statute first appeared substantially in its present form by the Laws of 1868, Chapter 828. That statute provided, so far as is material, as follows:

> "* * * If the summons be issued on the day the term expires or on the next day thereafter it may direct such summons to be made returnable on the same day, at any time after twelve o'clock noon and before six o'clock in the afternoon."
>
> * * *
>
> "If the summons be returnable on the day on which it is issued it shall be served at least two hours before the hour at which it is made returnable."

A reading of Sections 1419 and 1421 of the Civil Practice Act makes it obvious that the legislature, in following the long-established custom prevailing in this State since at least 1820, enacted these sections so that a landlord could speedily oust a tenant, who was staying in possession of premises after the expiration of his term. The obvious purpose for such speed was that it would be unfair to require that landlords wait to enter into new leases to the very day when the old lease expires.

It has been repeatedly adjudicated that legislation affecting residents of a state, and property situated therein, is the proper subject of the state's police power. It is further well settled that the inhibition upon the deprivation of property without due process of law is not violated by the legitimate exercise of legislative power, in securing the general public welfare and in the protection of the property rights of its citizens. (*Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U. S. 548, 558; *Chicago and Alton R. Co.* v. *Transbarger*, 238 U. S. 67, 77.)

Petitioner's complaint is that he was not afforded due process in a procedural matter. The law is clear that procedural due process is satisfied when a person is given reasonable notice and opportunity to defend at some stage of the proceeding. In our case, the statute provided for a two hour notice.

That such notice was reasonable, is clear from the following. The statutory pattern is such that persons who may be ousted on two hours' notice are tenants whose tenancies expire on a day certain. Such definite expiration date may occur in two ways. In the first place, the lease, by its terms, may expire on a day certain. If, however, the tenant occupies the premises for an indefinite period

as a tenant at will, or on a month to month basis, the Real Property Law, by Sections 228, 232(a) and 232(b), provides that before the summary proceeding can be initiated, a thirty days' notice must be served upon him.

It is thus clear that in this State, before a tenant may be ousted as a hold-over, he already knows, either by the very terms of his lease, or by a thirty day notice, that his tenancy will terminate on a day certain.

It should not be overlooked that the petition in the case at bar contained an allegation that such thirty day notice had been given, apart from the fact that the petitioner had been notified by registered mail on at least three occasions from June of 1943 that the respondent had relet the apartment to a new tenant for a term commencing September 15th, 1943 (R. 5).

The New York City Municipal Court Code, Section 5, has divided the City of New York into various convenient districts, in each of which districts a different Municipal Court is situated.

By Section 17, subd. 1, of the same Code, summary proceedings to recover real property must be brought in the district court in which the property is situated.

The record is clear that the premises where petitioner resided were only five minutes away from the Municipal Court in which these proceedings were instituted. Petitioner's wife, who was served with the precept and petition at 10:02 A. M. had ample opportunity to be present in Court, as the petition was returnable at 12:05 P. M. (R. 26).

The case of *Roller* v. *Holly*, 176 U. S. 398, cited at page 11 of petitioner's brief, has no application to the facts presented here.

This was pointed out in the case of *Goodrich* v. *Ferris*, 214 U. S. 71, which is peculiarly applicable to the facts presented herein, where the Court at pages 80 and 81 stated:

> "While various decisions of this court and of the courts of two states are cited in the brief of counsel for appellant under each of the foregoing propositions, none of them are apposite, and indeed, although citing them, counsel have specifically commented upon but one; viz., Roller v. Holly, 176 U. S. 398. * * * That case, however, concerned the validity of original process by which the conceded property of a non-resident, situate within the jurisdiction of the State of Texas was sought to be subjected to the control of its courts. The proposition which was presented for decision in that case was whether a statutory notice of five days, given to a resident of Virginia, requiring him to appear in Texas and defend a suit brought against him to foreclose a vendor's lien upon his land, constituted reasonable and adequate notice for the purpose. Manifestly that case is not in any particular analogous to the one under consideration, which is a case involving the devolution and administration of the estate of a decedent,—a subject peculiarly within state control. Case of Broderick's Will * * *, 21 Wall 503, 519. * * *"

The Court stated at page 81:

> "As held in Bellingham Bay and B. C. R. Co. v. New Whatcom, 172 U. S. 314, 318 * * *, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.'"

In *Kennard* v. *The State of Louisiana*, 92 U. S. 480, a State statute providing for the removal of a Judge by a proceeding initiated on only twenty-four hours' notice, and further limiting the time to appeal from a determination to one day after the rendition of a judgment, was held to constitute due process. The Court, at page 483, stated:

> "Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties, to give such cases as this precedence over the other business in the courts.
>
> * * *
>
> "From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the State."

In addition, Sections 1419 and 1421 of the Civil Practice Act were, in themselves, notice to petitioner that he could be ousted at the expiration of his lease, upon two hours' notice.

In *Anderson National Bank* v. *Luckett*, 88 L. ed. Advance Opinions 499, the Court at page 505 stated:

> "The statute itself is notice to all depositors of banks within the state, of the conditions on which the balances of inactive accounts will be deemed presumptively abandoned, and their surrender to the state compelled. All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. Reetz v. Michigan, 188 U. S. 505, 509, 47 L. ed. 563, 566, 23 S. Ct. 390; North Laramie Land Co. v. Hoffman, 268 U. S. 276, 283, 69 L. ed. 953, 957, 45 S. Ct. 491. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners, are familiar examples."

The Court further stated at page 506:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years.' "

The Court further stated at page 507:

> "What is due process in a procedure affecting property interest must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circum-

stances which may render the proceeding appropriate to the nature of the case. Davidson v. New Orleans, 96 U. S. 97, 107, 108, 24 L. ed. 616, 620, 621; Ballard v. Hunter, supra (204 U. S. 255, 51 L. ed. 471, 27 S. Ct. 261); North Laramie Land Co. v. Hoffman, supra (268 U. S. 282, 283, 69 L. ed. 957, 45 S. Ct. 491); Dohany v. Rogers, supra (281 U. S. 369, 74 L. ed. 912, 50 S. Ct. 299, 68 A. L. R. 434), and cases cited The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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